Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-161

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

BLACK CLOUD BUILDING CORPORATION,

Petitioner,

v.

ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

---

RESPONDENT DR. LLOYD F. NOVICK'S BRIEF IN OPPOSITION

ROBERT K. CORBIN
Attorney General
State of Arizona

ANTHONY B. CHING
Solicitor General
(Counsel of Record)
SHELDON H. MULLER
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 255-1610

QUESTION PRESENTED

Whether awarding attorney's fees to a state agency pursuant to a state statute that mandates the awarding of attorney's fees where a claim constitutes harassment, is groundless and not made in good faith, and pursuant to a state court rule of civil appellate procedure which allows the awarding of attorney's fees where the appeal is frivolous violates the right to petition the government for a redress of grievances guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
THE QUESTION PRESENTED HAS ALREADY BEEN RULED UPON BY THE COURT	2
FEDERAL STATUTES AND COURT RULES HAVE BEEN INTERPRETED TO PERMIT THE AWARDING OF COSTS AND ATTORNEY'S FEES TO THE GOVERNMENT	7
THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE COURT GRANTING REVIEW	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

	Page
Bill Johnson's Restaurants, Inc. v. NLRB 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983)	1,2,4, 5,6,9
Boomer v. United States 755 F.2d 696 (8th Cir. 1985)	8
Collorafi v. United States 579 F.Supp. 506 (E.D. N.Y. 1983	7
Connor v. Commissioner of Internal Revenue 770 F.2d 17 (2d Cir. 1985)	5
McDonald v. Smith _____ U.S. _____, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985)	6,7
State of Ohio v. Arthur Anderson & Co. 570 F.2d 1370 (10th Cir. 1978)	7
United States v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342 (9th Cir. 1985)	8
United States v. Northeastern Pharmaceutical and Chemical Company, Inc. 579 F.Supp. 823 (W.D. Mo. 1984)	8

TABLE OF AUTHORITIES (Cont'd)

	Page
Constitutions	
U.S., First Amendment	i,2,3, 4,5,6,8
U.S., Fifth Amendment	8
U.S., Fourteenth Amendment	i
Statutes	
28 U.S.C. § 1912	7,8
28 U.S.C. § 1927	7,8
I.R.C. § 6673	5,6
42 U.S.C. § 9607(a)(4)(A)	8
28 U.S.C. § 2412	8
Court Rules	
Sup.Ct.R. 17	9
Fed.R.App.P. 38	6,8
Fed.R.Civ.P. 37(a)(4)	7
Fed.R.Civ.P. 37(b)(2)	7

STATEMENT OF THE CASE

As its statement of the case, respondent adopts the Arizona Court of Appeal's decision reproduced at pp. 8a through 21a of Black Cloud's petition.

SUMMARY OF ARGUMENT

Review should be denied in light of the Court's holding in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), the numerous lower court cases awarding costs and attorney's fees to the government, and the Supreme Court rule providing for review only when there are special and important reasons therefor.

ARGUMENT

I THE QUESTION PRESENTED HAS ALREADY BEEN RULED UPON BY THE COURT

Petitioner's argument that citizens of the United States should be allowed to file frivolous lawsuits without having to pay the price for making the opposing party defend the claim is witout merit. While it is true that the First Amendment to the United States Constitution guarantees to the people the right to petition the government for a redress of grievances, this Court has already held that the right to so petition is not absolute and does not include the right to initiate baseless litigation.

In Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), a former restaurant

employee organized picketing and other forms of protest against the restaurant in response to her allegedly being fired for attempting to organize a union. The restaurant thereafter filed a lawsuit in state court seeking damages and an injunction in response to the terminated employee's actions. The employee filed a complaint with the NLRB, claiming that the state lawsuit was filed in retaliation to the employee's activities. The NLRB held a hearing on the matter which resulted in the issuance of a cease and desist order that ordered the restaurant to withdraw the state court complaint. After the Unted States Court of Appeals affirmed the Board's order, this Court held that while the NLRB must make certain findings before enjoining a lawsuit, it could enjoin a suit which lacks a reasonable basis in fact or law. While recognizing the First

Amendment right to petition the government for a redress of grievances, the Court stated that "baseless litigation is not immunized by the First Amendment right to petition." 461 U.S. at 743, 103 S.Ct. at 2170, 76 L.Ed.2d at 289. The Court then instructed the NLRB that with respect to a lawsuit that the NLRB cannot enjoin, if the state court finds against the employer and the NLRB then determines that the suit was filed in retaliation, "the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses." 461 U.S. at 747, 103 S.Ct. at 2172, 76 L.Ed.2d at 292. (Emphasis added.) In a footnote to this statement, the Court also recognized that a state has a substantial interest in deterring the filing of baseless litigtation in its courts.

The Court's holding in Bill Johnson's Restaurant, Inc. went further than the Court would have to go to rule against petitioner in the case sub judice. In Bill Johnson's, the Court held that the First Amendment right to petition does not prohibit the NLRB from totally precluding the bringing of a lawsuit if the claim is baseless. If the Court were to grant review on the instant case and find for respondents, the Court's ruling would be to the effect that the First Amendment right to petition does not prohibit the awarding of attorney's fees to a governmental agency if the lawsuit against the agency is baseless.

In Connor v. Commissioner of Internal Revenue, 770 F.2d 17 (2d Cir. 1985) the Court relied upon the holding in Bill Johnson's Restaurants, Inc. In Connor, the taxpayer argued that I.R.C.

§ 6673, which was relied upon by the tax court in awarding damages to the Commissoner, violated his constitutional right under the First Amendment to petition the government for redress of grievances. The Court of Appeals summarily rejected the argument holding that a taxpayer has no constitutional right to bring frivoluous lawsuits. The Court then went on to award the Commissioner double costs and attorney's fees for defending the appeal pursuant to Fed.R.App.P. 38.

In the same vein as Bill Johnson's Restaurants, Inc., the Court has also held that the Petition Clause does not povide absolute immunity from damages for expressing libelous and damaging falsehoods in petitions to government officials. McDonald v. Smith, ____

U.S. ____, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985).

II FEDERAL STATUTES AND COURT RULES HAVE BEEN INTERPRETED TO PERMIT THE AWARDING OF COSTS AND ATTORNEY'S FEES TO THE GOVERNMENT

In support of respondent's argument are the numerous federal statutes and court rules which permit the awarding of costs and attorney's fees against a party or the party's attorney that have been utilized in awarding such costs and fees to the government. See, e.g., State of Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir. 1978) (Arthur Andersen ordered to pay the State of Ohio its costs and expenses pursuant to Fed.R.Civ.P. 37(b)(2) and 37(a)(4) for Andersen's failure to comply with a discovery order); Collorafi v. United States, 579 F.Supp. 506 (E.D. N.Y. 1983) (U.S. awarded reasonable attorney's fees pursuant to 28

U.S.C. §§ 1927 and 2412 where the action was found to be wholly without merit); United States v. Northeastern Pharmaceutical and Chemical Company, Inc., 579 F.Supp. 823 (W.D. Mo. 1984) (U.S. awarded attorney's fees pursuant to 42 U.S.C. § 9607(a)(4)(A)); United States v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342 (9th Cir. 1985) (defense attorney personally ordered to pay the U.S. its attorney's fees pursuant to 28 U.S.C. § 1927); Boomer v. United States, 755 F.2d 696 (8th Cir. 1985) (U.S. awarded damages and double costs pursuant to 28 U.S.C. § 1912 and Fed.R.App.P. 38 for having to defend a frivolous, meritless claim despite appellant's argument that a claim based on the First and Fifth Amendments to the United States Constitution can't be frivolous). Respondent is not aware of any cases in

which costs or fees were not awarded to the government on the basis of the reasons set forth by petitioner.

III THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE COURT GRANTING REVIEW

Under Sup.Ct.R. 17, a review on writ of certiorari will be granted "only when there are special and important reasons therefor." Since the Court has already rejected the argument urged by petitioner and since petitioner makes no compelling arguments in support of the Court overruling or disapproving of its holding in Bill Johnson's Restaurants, Inc. and thereby holding that citizens should be allowed to file frivolous lawsuits against the government without having to pay the cost incurred by the government in defending the meritless claims, the Court should deny review.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny review of Black Cloud's petition.